No. 80-902

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

In the Matter of the Application for Admission to the New York State Bar of

FRANCIS G. FLEMING,

Appellant.

On Appeal from the New York Court of Appeals

BRIEF OPPOSING MOTION TO DISMISS

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I. Introduction.

Capitalizing upon the absence of defined procedures governing the admission of an attorney to the New York State Bar pursuant to 22 N.Y.C.C.R. §520.7(a)(2)(i)(d), the Office of the Attorney General for the State of New York appearing on behalf of the N.Y. Court of Appeals, designated appellee, (hereafter New York) seeks to challenge appellant's invocation of the jurisdiction of this Court, arguing alternatively that the appeal is both premature and untimely. The former contention is based upon New York's candid admission that "the legal question sought to be presented by the appellant *has not yet been passed* on by any New York Court, much less the highest Court of the

State." (Motion at 6) (Emphasis added). The latter is based on the argument that appellant's efforts to obtain a decision on the question from the New York Court of Appeals caused the time for appeal to elapse.

Before attempting to resolve the procedural dilemma in which New York tries to place him, appellant wishes to note preliminarily that the N.Y. Court of Appeals was expressly requested to enter a formal judgment or order so that the time within which an appeal could be filed would be certain. (Jurisdictional Statement at 3a.) This request was denied. (Jurisdictional Statement at 1a.) Thus, the uncertainty that exists as to when this period commenced is apparently New York's preference.

Secondly, appellant did all he could to present the question to the New York Court of Appeals for a decision[1]. New York admits that the question of appellant's "qualifications in relation to [the Court] rules" was presented. (Motion at 7). No statute or case is urged as requiring more specificity. Nevertheless, however, New York *chose* not to pass on the question. In "denying" appellant's application, New York *in effect* decided, albeit *sub silentio,* against *all* appellant's arguments, including the federal question it now admits was not "passed on". *Street* v. *New York,* 394 U.S. 576, 895 S. Ct. 1354, 22 L.Ed. 2d 572 (1968). The validity of New York's utilization of residence as a criterion was clearly drawn in question, even if the question was not given the consideration it deserved. *Bryant* v. *Zimmerman,* 278 U.S. 63, 73 L.Ed. 184, 49 S.Ct. 61, 62 A.L.R. 785 (1928).

Lastly, as the Attorney General recognized, the N.Y. Court of Appeals has "retained" the "function" of determining whether an applicant's five years of multi-state experience is the equivalent of five years of pure intrastate practice for the purpose of establishing an attorney's qual-

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[1] Jurisdictional Statement 12a-15a.

ifications for admission. (Motion at 4). And, the N.Y. Court of Appeals is the "highest judicial Court in the State". (Motion at 6). Despite this, it is argued that "review" by inferior state courts is required. This argument, however, ignores the futility of appealing a decision of the highest state court, on a question over which it has expressly retained exclusive control, to an inferior court. And, it ignores what the N.Y. Court of Appeals itself has recently pointed out with regard to its exclusive province:

> In the design of the procedures for admission to practice law in our State, *the determination of general and legal educational qualification* has traditionally been kept separate and apart from the coordinate determination as to character and general fitness. Responsibility for the former *has been retained by the Court of Appeals* while responsibility for the latter has been delegated by the Court of Appeals and by statute to the several Appellate Divitions.
>
> *As to educational qualification,* for some years the Rules of the Court of Appeals have made provision for admission *either by taking* and passing *the Bar examination or,* as a substantial equivalent for the few applicants seeking admission on motion without examination, *by both admission and five years' practice in another common-law jurisdiction.* Compliance with either alternative ends the inquiry with reference to general and legal educational qualification. Any supplement or substitute requirement as to this aspect of the applicant's eligibility for admission must be made by provision of the Rules of the Court of Appeals. There is none now.
>
> *The authority which has been delegated to the Appellate Divisions is limited to the area of moral character and individual integrity.* Whatever the depth of the entirely understandable concern and convic-

> tion of the members of the several Appellate Divisions that unqualified persons should not be admitted to practice in our State, the delegated jurisdiction of these courts is nonetheless limited. *Shaikh* v. *Appellate Division,* 39 N.Y. 2d 679, 385 N.Y.S.2d 514, 516 (1976) (Emphasis added).

It is the failure to resort to the "conventional procedure of applying to the Appellate Division for admission . . ." (Motion at 8) which New York suggests, among others, is fatal to this appeal. In appellant's view, however, because the question relates to his general legal and educational qualification, the exercise of an Appellate Division's jurisdiction would be futile. *Gordon* v. *Committee on Character and Fitness,* 48 N.Y.2d 266, 422 N.Y.S. 2d 642, 397 N.E.2d —— (1979) and the other cases cited by New York for the proposition that the Appellate Divisions can act on an application for admission relate to the "conventional procedure", not the type of admission based upon admission in another common law jurisdiction. *Shaikh* v. *Appellate Division, supra.*

II. The outcome of any additional state proceedings, even if available, is pre-ordained and the decision below is final as to the substantive questions raised.

It is undisputed that "[a] final judgment by the highest court of the state in which a decision can be had has been a prerequisite for the review of a state court judgment, by the Supreme Court, since the Judiciary Act of 1789." 12 *Moore's Fed. Prac.* ¶508.01[1] (1980). This requirement is, however, a practical and pragmatic one, not governed by "technicalities". *Radio Station WOW, Inc.* v. *Johnson,* 326 U.S. 120, 124, 65 S.Ct. 1475, 89 L.Ed. 2092, 2097 (1945). It is based on policies of federalism intended to avoid piecemeal review, advisory opinions, and unnecessary "federal intrusion in state affairs". *North Dakota*

State Board of Pharmacy v. *Synder's Drug Stores, Inc.*, 414 U.S. 156, 159, 94 S.Ct. 407, 38 L.Ed.2d 379 (1973).

However, a decision *is* appealable when it *"effectively determines* the litigation, leaving nothing to be *judicially* decided." 12 *Moore's Fed. Prac.* ¶508.01[3] (1980) (emphasis added).

Since the decision appealed from was rendered by New York's *highest* Court, the outcome of any further proceedings in inferior courts is preordained. New York's inferior courts are not free to review a determination of the Court of Appeals. *N.Y. Criminal & Civil Bar Ass'n.* v. *State,* 70 A.D.2d 716, 416 N.Y.S.2d 431 (App.Div. 1979). *See also, Silverberg* v. *Dillon,* 73 A.D.2d 838, 423 N.Y.S.2d 760 (1979).

This Court's pragmatic approach to the question of finality was fully analyzed in *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975). A judgment is deemed final within the meaning of 28 U.S.C. §1257(2) if the outcome of future state court proceedings is pre-ordained or conclusive. *See e.g., New York* v. *Cathedral Academy,* 434 U.S. 125, 129 n.4, 98 S.Ct. 340, 54 L.Ed.2d 346, 351 (1977). An Appeal can be taken at the time "the case is for all *practical* purposes concluded. . . ." *Cox Broadcasting* v. *Cohn, supra* at 479, 43 L.Ed. at 398 (emphasis added). Additional state proceedings which:

> "would be no more than a few formal gestures leading inexorably towards [the same result], and then another appeal to the [State's highest court] . . . whereupon the case could then once more wind its weary way back to the [U.S. Supreme Court] as a judgment unquestionably final and appealable . . . would be an inexcusable delay of the benefits Congress intended to grant by providing for appeal to this court [and] result in a completely unnecessary waste of time and energy. . . ." *Mills* v. *Ala-*

bama, 384 U.S. 214, 217, 86 S.Ct. 1434, 16 L.Ed.2d 484, 487 (1966).

New York concedes that its decision was final, but argues that because it was administrative or "non-judicial" an appeal does not lie. Motion at 8. This argument, however, ignores in *In Re Summers,* 325 U.S. 561, 89 L.Ed. 1875, 65 S.Ct. 1307 (1944) which expressly rejected jurisdictional arguments based on this type of characterization. *Summers* is virtually indistinguishable. The Supreme Court of Illinois had denied the application of a conscientious objector for admission to the Illinois Bar. The decision was communicated by letter from the Chief Justice.[2] An appeal to this Court followed. The argument was made by the Justices of the Illinois Supreme Court that no appeal could be taken because there were no adverse parties below, because "no entry was placed by the Clerk in the file, on the docket or in a judgment role . . .", and because "no process issued [nor was] any appearance . . . made". *Id.* at 567, 89 L.Ed. at 1800. This court rejected these arguments holding that the denial of admission constituted a basis for an appeal because judicial *power* was exercised. "The form of the proceeding is not significant. It is the nature and effect which is controlling." *Id.* The New York Court of Appeals has long treated its consideration of an attorney's educational qualifications as a *judicial* matter. *In re Cooper,* 22 N.Y. (8 N.Y.S.) 67 (1860); *Shaikh* v. *Appellate Division, supra.* This view has never been expressly modified; and *Cooper* has been cited with approval as recently at 1976. *Davidson* v. *N.Y. State Board of Bar Examiners,* 86 Misc.2d 744, 382 N.Y.S.2d 418, 420 (1976).

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[2] *Burns* v. *Ohio,* 360 U.S. 252, 79 S.Ct. 1164, 3 L.Ed.2d 1209 (1959) holds that a *letter* from the *Clerk* advising a litigant that court papers would not be accepted without the payment of a docket fee was deemed to be a final judgement by this Court within the contemplation of 28 U.S.C. §1257.

Furthermore, it is not clear that additional state court proceedings are available in the inferior state courts of New York.[3] There is no recorded case which establishes that any final determination of the N.Y. Court of Appeals can be reviewed in the inferior courts. Furthermore, judicial review of the bar admission process in New York is not favored. Even the final determinations of the N.Y. State Board of Law Examiners, *undeniably an administrative agency,* cannot be reviewed. *Davidson* v. *N.Y. State Board of Law Examiners, supra.* The four month limitation period for seeking review of an administrative agency has expired. Thus, it is questionable whether additional state court proceedings are even available.

Moreover, assuming that appellant sought review of the Court of Appeals decision and the inferior courts held they were powerless to review the highest court of the state, and that reasoning was ultimately affirmed on appeal by the Court of Appeals, review by this Court could then be precluded as that decision might be sustainable on purely state grounds. Appellant's federal claims should not be jeopardized in this manner. *North Dakota State Board of Pharmacy* v. *Snyder's Drug Stores, Inc., supra; Cox Broadcasting Corp.* v. *Cohn, supra.*

Appellant recognizes that it is unfortunate that the N.Y. Court of Appeals did not "pass on" the questions presented to it. However, "a state court may not, in the exercise of its discretion, decline to entertain a constitutional claim while passing upon kindred issues raised in

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[3] Although the Office of the Attorney General for the State of New York undoubtedly is acting appropriately in opposition to this appeal, it does so as an advocate. The fact that it appears on behalf of the N.Y. Court of Appeals, however, should not make its characterization of New York law conclusive as would probably be the case if the Court of Appeals had held in an opinion or decision that additional proceedings were available.

the same manner." *Williams* v. *Georgia*, 349 U.S. 375, 383, 75 S.Ct. 814, 99 L.Ed. 1161, 1171 (1955). This Court's exercise of jurisdiction in this case will not undermine the principles of federalism which disfavor premature review of state proceedings. The federal question was expressly and fully presented to the N.Y. Court of Appeals, *Street* v. *New York, supra*. New York declined to decide the question. Why is not known, but its failure should not bar this Court's consideration of the question.

Unless this Court focuses upon the practical limits of the power of New York's inferior courts, considerable mischief indeed will have been done. The absence of defined procedures relating to multi-state admission will have permitted a fair and substantial question to remain unanswered.[4]

III. The Record does not disclose that all questions raised below were fully adjudicated until September 4, 1980, Notice of Appeal was timely filed on November 26, 1980.

The Notice of Appeal was filed on November 26, 1980, within 90 days of the letter of the Clerk of the Court dated September 4, 1980, stating among other things that a formal judgment or order would not be entered. (Jurisdictional Statement at 1a). No challenge respecting the timeliness of the notice in relation to this document is made.

Nevertheless, New York argues that the Notice of Appeal was untimely asserting that an earlier letter received by appellant from the Clerk of the Court dated July 14, 1980 (Jurisdictional Statement at 4a) constituted a final decision in this matter, and, that appellant's letter in re-

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[4] New York has not argued that an adequate independent state ground supports its decision, nor that a substantial federal question does not exist.

sponse dated August 14, 1980 requesting "reconsideration of [the] application and if it is denied, . . . some formal articulation of the basis of the denial and a judgment or order" (Jurisdictional Statement at 3a) was ineffective to "revive" the time for appeal. (Motion at 8).

In appellant's view, the first letter was not a final judgment because it does not disclose that the questions were "fully adjudicated and that the adjudication [was] not subject to further review by a state court." 12 *Moore's Fed. Prac.* ¶508.01[10] (1980). Finality must be determined on a practical and pragmatic basis, rather than on the basis of mechanical technicalities. *Id.* This letter does not state that all questions were decided; rather, it states only that appellant's request "for waiver of strict compliance" of the Court's rules was denied. (Jurisdictional Statement at 4a). It makes no reference to appellant's substantive claim of *entitlement* pursuant to the strict provisions of the rules, nor does it address the federal issues presented.

Secondly, this letter does not disclose that a formal judgment would not be entered. Certainly, appellant should not be penalized because he requested certainty as to the time for appeal.

Although New York may have intended the July 14, 1980 to be a final decision, this intention was never expressed or implied. It became clear that New York had effectively determined *all* questions only when it stated so on September 4, 1980. Treating the first letter as final will inpose an obligation on litigants to file protective notices of appeal and discourage attempts to finalize matters in the state courts.

The Supreme Court Rules 11.3 provides that "the time for filing the notice of appeal runs from the date the judgment or decree sought to be reviewed is *rendered*. . . ." (Emphasis added). A decision cannot be rendered until it is transmitted and communicated. Even if New York

finally decided the question as of July 14, 1980, it failed to communicate its decision until September 4, 1980. Thus, the record does not disclose complete adjudication prior to the Clerk's second letter.

New York's interpretation of the finality rule is contrary to the practical and pragmatic approach adopted by this Court, and it undermines the very principles of federalism which are intended to minimize federal intrusion into its affairs.

The issue in this case is not one of revival; it is whether a state can *shorten* the time within which an appeal can be taken by its subsequent act of characterizing its former unclear and informal communication as having been final. If it can, the concept of finality will have become unworkable for want of certainty.

IV. Conclusion.

For all the foregoing reasons, New York's motion to dismiss this appeal should be denied.

Dated: New York, New York
February 11, 1981

Respectfully submitted,

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Certificate of Service

FRANCIS G. FLEMING, a member of the Bar of the United States Supreme Court, whose entry of appearance has been filed with the Clerk of the United States Supreme Court, being first duly sworn and placed upon his oath states that forty copies addressed to the Clerk of the U.S. Supreme Court, Washington D.C. 20543 and three copies of the Brief Opposing Motion to Dismiss were deposited February 11, 1980 in a U.S. Post Office or mail box with first-class postage prepaid, addressed to the following person:

Franklin K. Breselor
Robert Abrams
Attorney General of the
State of New York
The Capitol
Albany, New York 12224

FRANCIS G. FLEMING

Sworn to before me this
11th day of February, 1981

SONIA AGUIRRE
Notary Public
State of New York
No. 01A5056610
Qualified in Rockland County
Cer. Filed in New York Cty.
Commission Expires March 30, 1982